United States Courts
Southern District of Texas
ENTERED

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Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
This Document Relates to H-03-2345 and to **All Cases Involving Removal Based on "Related To" Bankruptcy Jurisdiction Under 28 U.S.C. § 1452**	§ § § § § §	
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§ § § § § § § § §	CIVIL ACTION NO. H-01-3624 AND CONSOLIDATED CASES
JOE H. WALKER, ET AL., Plaintiffs, VS. ARTHUR ANDERSEN, L.L.P., ET AL. Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-03-2345

MEMORANDUM AND ORDER

Pending before the Court in member case number H-03-2345 are (1) Plaintiffs Joe H. Walker, Andrew H. Walker, and Deborah C. Walker's motion to reconsider/alter or amend judgment denying Plaintiffs' motion to remand (instrument #1609 in *Newby;* #40 in H-03-2345)[1] and (2) motion to ascertain status of remand motions (#2056 in *Newby)*.

[1] In its Order of Consolidation, entered on July 23, 2003 (#1579 in *Newby;* #39 in H-03-2345), this Court denied Plaintiffs' motion to remand (#9 in H-03-2345).

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Walker et al. v. Arthur Andersen LLP et al., filed on November 6, 2002, was brought by Enron bond purchasers asserting claims for common law fraud, conspiracy, intentional infliction of emotional distress, and negligent misrepresentation under Tennessee state law against current and former officers and members of the board of directors of Enron Corporation and Enron's auditor. It was removed from the Circuit Court for Davidson County, Tennessee to the United States District Court for the Middle District of Tennessee, by Outside Directors Robert A. Belfer, Norman P. Blake, Jr., John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, Charles E. Walker, and Herbert S. Winokur, on December 5, 2002, less than thirty days after service of process on them, and thus in compliance with 28 U.S.C. § 1446,[2] on diversity jurisdiction, "related to" bankruptcy jurisdiction, and supplemental jurisdiction grounds, none of which was contested by Defendants.

Facts and Procedural History

According to the notice of removal, the Outside Directors and other Defendants began being served with summonses and copies of the initial pleading on November 8, 2002. Certified mail receipts reflect that service was also effected on Defendants Kevin P. Hannon, Joseph W. Sutton, and Rebecca Mark-Jusbasche on November 12, 2002; on Defendants David W. Delainey, Stanley C.

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[2] Plaintiffs incorrectly computed the 30 days from the date the complaint was filed, rather than the date when service was first effected. Fed. Rule Civ. P. 1446(b).

Horton, and Steven J. Kean on November 13, 2002; on Defendants Mark A. Frevert and Richard B. Buy on November 14, 2002; on Defendants Kenneth L. Lay and Jeffrey K. Skilling on November 15, 2002; on Defendant Richard A. Causey on November 18, 2002; on Defendant Lou L. Pai on December 3, 2002; and on Defendant Ken L. Harrison on December 5, 2002. The notice of removal further states that Defendants Lay, Skilling, Pai, Causey, Frevert, Hannon, Horton, Kean, Rice, Whalley, Buy. Koenig, McConnell, McMahon, Olson, Sutton, Mark-Jusbasche, and Delainey requested extensions of time to respond, thereby demonstrating that they had been served or otherwise received a copy of the initial pleading prior to removal. Moreover, the notice of removal conclusorily stated that "all defendants consent to the removal of this action," although none but the removing Defendants had filed a notice of removal or a written consent to the one filed on December 5, 2002 by the Outside Directors. #1 at 2.

On December 31, 2002, Plaintiffs Joe H. Walker, Andrew H. Walker, and Deborah C. Walker moved for remand under 28 U.S.C. § 1447(c)[3] on the sole ground that no served Defendants other than

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[3] Title 28 U.S.C. § 1447(c), the general remand statute, provides in relevant part,

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before the final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

It further provides, "An order remanding the case may require the Outside Directors had filed a notice of removal or any type of writing consenting to the removal or joining in the notice filed by the Outside Directors, within the thirty-day period permitted for such filing under 28 U.S.C. § 1446(b)("The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . ."), a procedural defect in violation of the rule of unanimity according to Plaintiffs.[4] No party had challenged the existence otherwise of diversity, "related to" bankruptcy jurisdiction, and

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payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." *Id.*

Title 28 U.S.C. § 1447(d), which is to be read *in pari materia* with § 1447(c), states that with the exception of certain kinds of civil rights actions, "[a]n order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise . . . ." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995)("[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1337(d). As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction--the grounds for remand recognized by § 1447(c)--a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).").

[4] The Fifth Circuit construes § 1446(a)'s requirement that a notice of removal must be filed by a defendant or defendants within thirty days, based on § 1441(a) ("a defendant or defendants may remove the case"), as mandating that where there is more than one defendant, all defendants must join in the removal petition. *Doe v. Kerwood*, 969 F.2d 165, 167 (5th Cir. 1992), *citing Chicago, Rock Island & Pacific Railway Co. v. Martin*, 178 U.S. 245 (all defendants must join in a petition for removal). This rule of unanimity requires that there be "some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have the authority to do so, that it has actually consented to such action." *Getty Oil v, Ins. Co. of N. America*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988).

supplemental jurisdiction here, but only the procedural defect of untimely consent to the removal.

On January 10, 2003, seemingly in response to the motion to remand, Defendants filed a joint motion to amend the notice of removal by way of supplementation and joint statement of unanimous consent, with attached copies of consent letters that had been obtained from all served Defendants prior to removal. Instrument #16 in H-03-2345.

On January 17, 2003, Defendants Kenneth D. Rice, Lawrence G. Whalley, Mark E. Koenig, Michael S. McConnell, Jeffrey McMahon, and Cindy K. Olson (collectively, "Certain Officer Defendants") filed their own notice of removal (#21), also asserting jurisdiction on diversity and "related to" bankruptcy grounds and stating that none of them had yet been served and that the filing of this additional notice of removal was "to ensure that any procedural defects, if any, in the prior Outside Directors' notice of removal do not defeat this Court's jurisdiction." #21 at 1 n.1.

Court's Order of July 23, 2003 (#1579)

In the Order of Consolidation, entered on July 23, 2003, this Court denied Plaintiffs' motion to remand based on a recent line of cases in the Sixth Circuit, from which circuit this case was transferred after this case was removed from state court. The Court concluded that the Sixth Circuit cases generally held that technical defects in a notice of removal are curable even after the thirty-day period for removal, especially when the facts of federal jurisdiction exist, as is the situation here. *Jordan v. Murphy*, 111 F. Supp. 2d 1151, 1152 (N.D. Ohio 2000), *citing Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 969 (6th Cir. 1993)(permitting amendment after removal papers failed to state the citizenship of the removing defendant partnership); *Gafford v. General Elec. Co.*, 997 F.2d 150, 164 (6th Cir. 1993)(permitting amendment after removal papers failed to state removing defendant's principal place of business); *Klein v. Manor Healthcare Corp.*, 19 F.3d 1433 (Table), Nos. 92-4328 and 92-4347, 1994 WL 91786, *4 (6th Cir. Mar. 22, 1994)(copy filed at attachment to #35)(noting the recent trend "express[ing] a reluctance to interpret statutory removal provisions in a grudging and rigid manner, preferring instead to read them in a light more consonant with a modern understanding of pleading practices," the panel held that where "jurisdictional facts do indeed exist," "a petition for removal may be amended under the same considerations governing the amendment of any other pleading containing jurisdictional allegations."); and *Greenwood v. Delphi Automotive Systems, Inc.*, 197 F.R.D. 597, 599-600 (S.D. Ohio 2000)(holding that defect in notice of removal signed by licensed attorneys who were not members of the bar of the district court was curable by their subsequent timely admission *pro hac vice*). This Court noted that the Sixth Circuit's view is clearly at odds with the strict construction approach of the majority of courts, but nevertheless found this case was properly removed under its law.

This Court further determined that the Sixth Circuit followed the "last filed" rule for removal in multi-defendant cases where the defendants were served at different times: according to the "last filed rule," each defendant has thirty days from the time he is served with process to remove a case to federal court, if the other defendants consent, even if the case had previously been remanded for a procedural defect in a prior removal by an earlier served defendant. *Brierly v. Alsuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000).

In contrast, in multi-defendant cases the Fifth Circuit follows the first-served rule, which interprets § 1446(b) as mandating that removal by any defendant must occur within thirty days of service of process on the first defendant and with the consent of all served defendants. *Brown v. Demco, Inc.*, 792 F.2d 478, 481 & n.11 (5th Cir. 1986)("If the first served defendant abstains from seeking removal or does not effect timely removal, subsequently served defendants cannot remove . . . due to the rule of unanimity . . . ."); *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1998); *Doe v. Kerwood*, 969 F. 2d 165, 167, 169 (5th Cir. 1992)(all served defendants must join in the petition for removal within thirty days of service on the first defendant and if consent of all served defendants is not timely obtained, the removal is procedurally defective). Purportedly, the first-served rule is the majority rule.[5]

In their motion to reconsider, Plaintiffs contend that Fifth Circuit law, not Sixth Circuit law, should govern the removal procedure here.

Depending upon what circuit's law applies, because Certain Officer Defendants claim that they were not served at the time they filed their own post-removal notice of removal (#21) on January 17, 2003, their notice either was or was not timely and

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[5] As will be discussed, a number of courts and critics have criticized this characterization because they believe the holding in *Murphy Brothers Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), issued years after the Fifth Circuit opinions, has changed the analysis. *See, e.g., Piacente v. State University of New York at Buffalo*, No. 03-CV-0672E(SC), 2004 WL 816885, *3 (W.D.N.Y. Feb. 14, 2004)("The [later served defendant] rule is the modern trend. Although the text of section 1446 is determinative, it is important to note that the majority of post-*Murphy Brothers* authorities have adopted the [later served defendant] rule."); *Ratliff v. Workman*, 274 F. Supp. 2d 783, 786 n.3 (S.D. W. Va. 2003)("The majority of scholarly articles considering the issue have rejected the Fifth Circuit's approach.")(citing Howard B. Stravitz, *Rocking the Removal Trigger*, 53 S.C.L. Rev. 185, 200-04 (2002); C. Todd Hagins, *Sands in an Hourglass; Solving the Puzzle of Time Limits for Removal to Federal Court*, 68 Def. Couns. J. 421, 428-31 (2001); Comment, Barbara A. Wiesman, *Applying Murphy Bros. v. Michetti Pipe Stringing, Inc. to Removal in Multiple Defendant Lawsuits*, 34 Loy. L.A. L.Rev. 323, 330-33 (2000); and Comment, Derek S. Hollingsworth, *Section 1446: Remedying the Fifth Circuit's Removal Trap*, 49 Baylor L. Rev. 157, 162-73 (1997)); *Smith v. Mail Boxes, Etc. USA, Inc.*, 191 F. Supp. 1155, 1159 (E.D. Cal. 2002)("[I]t is not entirely clear to this court that the first-served interpretation constitutes the majority rule. While the majority of published district court decisions have adopted the first-served rule, the body of published orders does not necessarily constitute a representative sample of actual decisions on this issue. Furthermore, the last-served rule has been adopted by more appellate courts than the first-served rule. . . . [T]he Fifth Circuit is the only appellate court to have explicitly adopted the first-served rule.").

the [second] removal on diversity (as well as on "related to" bankruptcy) grounds was or was not valid. As will be discussed, the issue is further complicated by the implications of the United State's Supreme Court's decision *Murphy Brothers Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999), holding that the phrase "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading" in 28 U.S.C. § 1446(b) means that the time for filing a notice of removal only begins to run when the defendant is formally served with a summons and has received a copy of the complaint.

Furthermore, in its order denying the motion to remand, with respect to the removal based on "related to" bankruptcy jurisdiction under § 1334(b) and § 1452, this Court observed that although there is a split of authority, the majority of courts addressing the issue have concluded that the unanimity rule does not apply to removal under 28 U.S.C. § 1452; the majority instead have determined that one party may remove a case from state court under 28 U.S.C. § 1452[6] without the consent of other parties.

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[6] Title 28 U.S.C. § 1452, addressing "removal of cases related to bankruptcy cases," provides in pertinent part,

> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
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> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision not

See, e.g., Creasy v. Coleman Furniture Corp., 763 F.2d 656, 660 (4th Cir. 1985); *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 323 (10th Cir.), *cert. denied*, 511 U.S. 1082 (1994); *In re Lazar*, 237 F.3d 967, 973 n. 2 (9th Cir.), *cert. denied sub nom. California v. Schulman*, 534 U.S. 992 (2001); *Sommers v. Abshire*, 186 B.R. 407, 408-09 (E.D. Tex. 1995). Because in its order of July 23, 2003, this Court found that there was no procedural defect in the removal under Sixth Circuit law and that it had diversity jurisdiction over H-03-2345, the Court did not reach the "related to" bankruptcy jurisdiction issues. Nevertheless it stated in the order that it would be examining "related to" bankruptcy jurisdiction with respect to a number of motions filed in other member cases and would review this action to determine whether the Court has "related to" bankruptcy jurisdiction over this suit. The troubling issue involved in "related to" bankruptcy jurisdiction, which this Court has since addressed and which it now reconsiders, in part at the urging of parties who joined MDL 1446 after the Court's order and had no opportunity to brief the question before the Court ruled,[7] and also at the behest of Plaintiffs' instant motion to reconsider, is whether unanimous consent of Defendants is necessary for removal based on "related to" bankruptcy jurisdiction under § 1452.

> to remand, is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court . . . .

[7] *See, e.g.*, #1734, Bank Defendants' Supplemental Response.

Motion for Reconsideration/Alter or Amend Judgment

Plaintiffs' current motion to reconsider/alter or amend judgment explains that they were waiting for completion of the transfer by the Judicial Panel on Multidistrict Litigation and attempting to track docketing of this suit in Houston, so that they could file a supplement to their motion to remand (now #1610) to argue that because the case was transferred by the Judicial Panel, the law of the transferee district court, i.e., Fifth Circuit law, not the Sixth Circuit, should apply to the remand issue, and that the case should therefore be remanded. *Tel-Phonic Servs., Inc. v. TBS Inter., Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992). Although the motion to remand was ripe when the Court issued its order, because Plaintiffs were unable to trace the suit and discover the Houston case number during the transfer and because they did not receive the Court's order until July 28, 2003, they never had an opportunity to file that supplement for the Court's consideration. Furthermore, in that supplement they alternatively contend that even if Sixth Circuit law applies, the facts in the cases cited by the Court are distinguishable from those here and that remand is still proper. They also insist that the unanimity rule applies to § 1452 "related to" bankruptcy jurisdiction removals.

Plaintiffs have requested a hearing, which the Court finds is unnecessary because the issues here are legal and both sides have had a full opportunity to brief their positions fully. Plaintiffs also ask for an award of "just costs and actual expenses, including attorney fees, incurred as a result of the removal," pursuant to 28 U.S.C. § 1447(c). Finally they ask the Court to enjoin Defendants from attempting to remove this case again when two unserved Defendants, Arthur Andersen LLP and Andrew S. Fastow, are served because of "Defendants['] extreme tenacity in attempting to amend the original removal notice and find some way around their procedural failure."

The Court grants the motion to reconsider and has reviewed Plaintiffs' supplemental brief, Outside Directors Defendants' response (#42), and Plaintiffs' reply (#43), and conducted its own research. First, with respect to the Court's diversity jurisdiction here, in light of the removal of this case from a Tennessee state court to a district court in the Sixth Circuit and then the transfer of this suit this Court under § 1407, the Court examines two issues: (1) which Circuit's law applies to the removal issues and (2) does the filing of a second notice of removal by Certain Officer Defendants affect the Court's diversity jurisdiction. Second, the Court addresses the issue of whether the rule of unanimity applies to "related to" bankruptcy jurisdiction under § 1334(b) and § 1452.

I. Diversity Jurisdiction Issues

A. Applicable Law

With respect to which law should govern the issue of Defendants' untimely consent to removal by means of their amended/supplemented notice of removal following the transfer of this case to this Court under § 1407, the Court concludes that Fifth Circuit law should control for reasons explained below.

As an initial step, this Court would point out that the Fifth Circuit case cited by Plaintiffs, *Tel-Phonic Servs.*, 975 F.2d at 1138, to argue that Fifth Circuit law applies, is inapposite because it dealt with an inapposite transfer statute: *Tel-Phonic Servs.* addressed the applicable law of transfer for improper venue under 28 U.S.C. § 1406(a). It is logical that where venue was improper originally, the law of that venue should not apply after transfer to a court where venue is proper. *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1109-10 (5th Cir. 1981)(In agreement with the majority of courts that have considered the issue, the Fifth Circuit wrote, "'A transfer under § 1406(a) is based not on the inconvenience of the transferor forum but on the impropriety of that forum. If the state law of the forum in which the action was originally commenced is applied following a § 1406(a) transfer, the plaintiff could benefit from having brought the action in an impermissible forum.'"), *quoting Martin v. Stokes*, 623 F.2d 469, 472 (6th Cir. 1980); *Jackson v. West Telemarketing Corp. Outbound*, 245 F.3d 518, 523 (5th Cir. 2001), *cert. denied*, 534 U.S. 972 (2001); *in accord Manley v. Engram*, 755 F.2d 1463, 1467 (11th Cir. 1985).

In comparison, it is black-letter law that in diversity jurisdiction cases, where the transfer is for the convenience of the parties and the witnesses under 28 U.S.C. § 1404(a) and where venue in the first court was proper, the applicable law is that of the transferor court, even if the plaintiff, himself, sought the transfer. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964)("[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms" in order to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court that could not have been achieved in the Courts of the State where the action was filed."); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990)(under *Van Dusen*, transferee court must apply law of transferor court no matter which party sought the transfer); *Ellis*, 646 F.2d 1109 ("'Once a plaintiff has exercised his choice of forum under § 1404(a), the state law of that forum should govern the action, regardless of the wisdom of the plaintiffs' selection. Thus no matter who seeks to transfer the action to a more convenient forum under § 1404(a), the state law of the forum in which the action was originally commenced remains controlling.'"), *quoting Martin v. Stokes*, 623 F.2d at 473.

A transfer by the Judicial Panel for Multitdistrict Litigation under § 1407[8] is more analogous to that under § 1404(a)[9] than under § 1406(a), because presumably venue was proper in the federal court from which it originated (or in the state court in that district if the action was improperly removed). Moreover, a § 1407 transfer, like a § 1404(a) transfer, is also effected for pragmatic reasons (convenience of the parties and witnesses, efficient conduct of multiple actions with common questions of fact) rather than § 1406(a)'s legal necessity (e.g., lack of personal jurisdiction). Nevertheless, a § 1407 transfer is also distinguishable and raises complex questions because it coordinates or consolidates a group of actions from different circuits, is only temporary, results in rulings by the transferee court which may be subject to appellate review in different circuits at different times in the litigation, and controls

[8] Section 1407 provides for transfer by the Judicial Panel on Multidistrict Litigation of "civil actions involving one or more common questions of fact . . . pending in different districts . . . for coordinated or consolidated pretrial proceedings" upon the Judicial Panel's "determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." According to the Judicial Panel, § 1407(a) serves "to promote the just and efficient conduct" of multidistrict cases *inter alia* by "eliminat[ing] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts." *In re Plumbing Fixtures Cases*, 298 F. Supp. 484, 491-92 (Jud. Pan. Mult. Lit. 1968).

[9] *Van Dusen* addressed the choice-of-law question where the court's jurisdiction was based on diversity, not federal question, and the issues arose under state law. As will be briefly noted, there is a division of opinion whether the *Van Dusen* rule applies in federal question cases and a different construction of federal law. Because diversity jurisdiction is alleged here, that dispute is not relevant.

multiple cases which, if not settled or resolved during pretrial proceedings by the transferee court, are ultimately remanded for trial back to the various transferor fora, whose laws might be different from those of the transferee court and from each other.

Although the *Van Dusen* rule originally applied only to state law claims in diversity actions, as will be discussed *infra*, the rule was subsequently extended by some courts to claims under federal laws that were construed differently by different circuits.

The precise issue here is what law applies when a diversity case with state-law causes of action has been transferred under 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings pursuant to an order of the Judicial Panel on Multidistrict Litigation and where the relevant federal procedural law regarding removal is construed differently by the transferor and transferee courts' federal appellate courts.

The multidistrict litigation in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985), *after remand*, 664 F. Supp. 1488 (D.D.C. 1987), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987)(Ginsburg, Ruth Bader, Judge), *aff'd on other grounds sub nom. Chan v. Korean Air Lines*, 490 U.S. 122 (1989), was comprised of wrongful death suits from various federal district courts transferred under § 1407 to the District of Columbia. Upon receipt of the member cases, the district court rejected precedent from the Second Circuit (from which some of these MDL cases came) regarding the issue of what constituted the requisite type set on airline tickets to constitute adequate notice of the airline's liability cap to qualify for coverage under the Warsaw Convention and Montreal Agreement.[10] The district court determined that, as the transferee court, it had to make an "independent interpretation" of the Warsaw Convention/Montreal Agreement rather than merely accept the precedent of the Second Circuit, i.e., the controlling law of the transferor court. The district court then concluded that the defendant, Korean Air Lines, could avail itself of the Warsaw Convention/Montreal Agreement's limitation of liability to $75,000 in damages per passenger, despite the fact that the notice of the liability cap on the airline's tickets was in a smaller type set than that specified in the Montreal Agreement. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463 (D.D.C. 1985), *after remand*, 664 F. Supp. 1488 (D.D.C. 1987),[11] *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd on other grounds sub nom. Chan v. Korean Air Lines*, 490 U.S. 122 (1989). Explaining why he performed his own analysis, Chief Judge Aubrey E. Robinson, Jr. concluded that the *Van Dusen* rule was inapplicable to federal law claims because

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[10] The Second Circuit had decided in *In re Air Crash Disaster of Warsaw Poland on March 14, 1980*, 705 F.2d 85 (2d Cir. 1983)[, *cert. denied sub nom. Polskie Linie Lotnicze (LOT Polish Air Lines) v. Robles*, 464 U.S. 845 (1983), *abrogated*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989)], that as the "bright line" for adequate notice, an airline had to print a statement of the applicability of the limitation on liability in at least 10-point modern type size or the airline would lose the benefit of the limitation. *In re Korean Air Lines*, 664 F. Supp. at 1474-75.

[11] The issue was certified for interlocutory appeal under 28 U.S.C. § 1292(b), remanded for clarification, and then affirmed by the Second Circuit.

"'federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than another determine his case.'" 664 F. Supp. at 1489, *quoting H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963), and *citing In re The Pittsburgh*, 543 F.2d 1058, 1065 n.19 (3d Cir. 1976)("[I]n theory, at least, federal law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact."). He concluded,

> What this means in practice is that each federal court is bound to apply federal law the way it believes is appropriate. In the case at hand, this meant that the Court was to thoroughly analyze and consider Second Circuit law (and the law of every other Circuit for that matter) but not to blindly accept it.

664 F. Supp. at 1489. Chief Judge Robinson conceded that "in the short-run" the "uniformity expressed by *Van Dusen* would be destroyed," but he insisted there would be "long-term benefits of each federal court independently considering an issue":

> In this way, an issue may be viewed from several unique perspectives. If at the conclusion of these various analyses more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity to the federal system. The uniformity achieved in this matter is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

Id. He also stated that even though his decision in *In re Korean Air Lines* was in conflict with the law of the Second Circuit, his decision would be the "law of the case" and would have to be followed when the case was returned to New York: "If this were not true and transferor courts were free to readjudicate issues determined by transferee courts, transfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication that they were designed to eliminate." *Id.* at 1489-90.

On appeal, the District of Columbia Circuit Court of Appeals affirmed United States District Court of the District of Columbia's denial of partial summary judgment. The District of Columbia appellate panel expressly addressed the question whether the *Van Dusen* rule, which originated in a diversity action involving state law issues, should apply to cases involving federal law claims that were transferred under § 1407 and commented that "the question is perplexing, particularly in the context of 28 U.S.C. § 1407, a statute authorizing transfers only for pretrial purposes." 829 F.2d at 1174. In limiting the *Van Dusen* rule to questions of state law, the appellate court agreed with the district court that unlike a diversity action with claims under state law that are likely to be substantively different in different states and require the judge to "apply divergent states' laws" in a multidistrict litigation, in suits where the claims are under federal law, theoretically the law should be interpreted uniformly because "the federal courts comprise a single system in which each tribunal endeavors to apply a single body of law." 829 F.2d at 1175. Indeed "it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law." *Id.* at 1175-76. Therefore the transferee court has the right to use the law of its own circuit because "[w]here federal claims are transferred . . . the principle that the transferee court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply." *Id.* The Honorable Ruth Ginsburg[12] wrote for the panel, "'the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit.'" 829 F.2d at 1174, *quoting* Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 721 (1984). Moreover she maintained, "'federal courts have not only the power but the duty to engage independently in reasoned analysis.'" *Id.* at 918, *quoting* Marcus at 702.

In general the Second, Eighth, Ninth and Sixth Circuits have followed the rule developed in *In re Korean Air Lines*, making it the majority rule in diversity cases. There is a significant division of opinion, however, in federal question cases when federal law directs the courts to apply state law that varies with the forum.

Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1126-27 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994), involved two

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[12] Judge D.H. Ginsburg concurred, and Judge Williams joined in that concurrence. 829 F.2d at 1176-86.

groups of plaintiffs that filed a § 10(b) claim under the Securities and Exchange Act of 1934 before 1990, at a time when federal courts looked to state statutes of limitations. Judge Frank Easterbrook, writing for the Seventh Circuit panel, while endorsing the *Korean Air Lines* rule that "a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim," 8 F.3d at 1126, carved out a limited exception. He construed Section 27A[13] of that Act's express direction that the "limitations period . . . shall

[13] Section 27A was enacted as a stopgap measure to "save" the suits of those plaintiffs who had relied on the non-uniform statutes of limitations laws employed before the Supreme Court issued *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (June 20, 1991)(holding that section 9(e) of the 1934 Securities and Exchange Act is the most appropriate limitations period for § 10(b) claims) to establish a uniform limitations period out of the chaos of state and federal limitations periods being applied by different courts. As described by Judge Easterbrook in *Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994),

> [T]he law in use on June 19, 1991, was not nationally uniform. By then three circuits had adopted § 13 of the '33 Act for suits under § 10(b). One applied this rule retroactively, another prospectively (in the main) and this circuit had not ruled on retroactivity. In all other circuits the courts derived the period of limitations from state law--with different circuits looking to different kinds of state laws.

Id. at 1126. Section 27A provided that for private civil actions under § 10(b) filed on or before June 19, 1991, "The limitation period . . . shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such law existed on June 19, 1991." The Seventh Circuit construed this provision to mean that district courts should apply the federal law relating to statutes of limitations as interpreted by each of their different transferor circuits on that date instead of allowing the transferee courts to make independent judgments.

be the limitation by the laws applicable in the jurisdiction, including the principles of retroactivity, as such laws existed on June 19, 1991" as implying the existence of "a non-uniform federal law" and as requiring the application of the transferor forum's circuit law, not an independent judgment by the transferee district court. The Seventh Circuit therefore followed the precedent of the transferor court, which in that instance was the law of the Ninth Circuit Court of Appeals where the action had commenced in 1990, and applied California's three-year limitations period for fraud. "Whenever different federal courts use different rules," Judge Easterbrook wrote, and "[w]hen the law of the United States is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*: that a transfer under § 1404(a) accomplishes 'but a change of courtrooms.'" 8 F.3d at 1127.[14]

In the same vein, in a post-*In re Korean Airlines* case, *In re United Mine Workers of America Employee Benefit Plans Litigation*, 854 F. Supp. 914, 916 (D.C.D.C. 1994), pension-benefit-trust plaintiffs in five multidistrict litigation member actions, transferred under § 1407, sought to recover delinquent contributions from employers under the Labor Management Relations Act and the Employee Retirement Income Security Act. Since neither federal statute contained an express statute of

[14] Judge Easterbrook concluded the *Van Dusen* rule applied to both diversity and federal question jurisdiction and to both federal and state law actions. 8 F.3d at 1127.

limitations, the issue before District Judge Thomas F. Hogan was "whether the transferor fora statutes of limitations, the District of Columbia's three-year statute of limitations period or an analogous federal limitations period appl[ies] to these multidistrict litigation cases." 854 F. Supp. at 915. He noted that typically in ERISA delinquency actions the court applies its own state's limitations period for contract claims, but in this multidistrict litigation, the cases came from four different states and the District of Columbia, with limitations periods ranging from three to fifteen years. *Id.* at 916. Although the court "accepts the basic *Korean Air Lines* principle that a transferee should normally use its own best judgment about the meaning of federal law when evaluating a federal claim," Judge Hogan also agreed with Judge Easterbrook's decision in *Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994), discussed *infra*, that *Van Dusen* and *Barracks* do apply in certain circumstances in federal question cases. Where a court must address "geographically non-uniform limitations periods," he adopted the *Eckstein* rule that the limitations periods of the transferor fora should control. 854 F. Supp. at 919. The *United Mine Workers* court distinguished the situation before it from that in *Korean Air Lines*: "the difference in limitations periods is not due to different interpretations of federal law; rather, it is inherent in the varying state statutes of limitations. As long as Congress continues to instruct federal courts implicitly to apply state-law limitations periods, the federal law will remain geographically non-uniform." 854 F. Supp. at 921. It pondered the problem that "applying the law of the transferor fora may well mean that even though plaintiffs assert essentially the same claims against a common group of defendants, some of plaintiffs' claims will be time-barred and others will not, based on where plaintiffs elected to file suit"; at the same time "it seems inherently unfair to deprive a plaintiff who properly files an action in a jurisdiction with personal jurisdiction and venue of its cause of action simply because the case is consolidated with a multidistrict litigation taking place in another jurisdiction." *Id.* Judge Hogan, following this "expanded" *Van Dusen* rule for federal question jurisdiction cases where there was conflict in interpretation of the relevant federal law, held that the statutes of limitations under the Labor Management Relations Act and the Employee Retirement Income Security Act[15] were those established by the transferor courts. The trust documents at issue specified that the trust funds "'shall be construed according to Federal law, and to the extent not preempted or inconsistent with such Federal law, the laws of the District of Columbia.'" 854 F. Supp. at 922. Because the district court "had already concluded that *federal* law mandates the application of the transferor fora's statutes of limitations,"

[15] Neither of these has an express statute of limitations so the court must turn to the most analogous state statute of limitations; for ERISA delinquency actions generally the limitations period for contract claims is used. *Id.*, 854 F. Supp. at 916. The limitations for breach of contract claims varied in the states were the suits were originally filed. *Id.*

it "decline[d] to consider the effect of the trust documents' secondary reference to District of Columbia law." *Id.* In other words, the *United Mine Workers* court concluded that the rule of the transferor court should be followed where a federal statute expressly or implicitly requires application of state law, such as state statutes of limitations, but that once that issue has been decided, the transferee court should, under *Korean Air Lines*, apply its own independent analysis of the substantive law to the remaining issues.

Subsequently the Eighth Circuit also held that in multidistrict litigation, "[w]hen analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located," but for state-law questions, it applied *Van Dusen* and held that the transferee court should apply the law of the state that would have been controlling had the case not been transferred for consolidation for pretrial purposes. *In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation*, 97 F.3d 1050, 1055 (8th Cir. 1996), *citing In re Korean Airlines,* 829 F.2d at 1176 (holding that the transferee court should make an independent interpretation of federal law issues), and *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594, 610 (7th Cir.)(holding transferee court must apply the "choice-of-law rules of the states where the actions were originally filed" for state law questions), *cert. denied*, 454 U.S. 878 (1981). *See also Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994).

Not all circuits have agreed. Relying on the independent judgment approach of *In re Korean Air Lines,* in *Menowitz v. Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993), in which the Second Circuit panel also addressed Section 27A and differing views about which statute of limitations for § 10(b) claims under federal law should apply, the Second Circuit concluded that the rule of *Van Dusen* does not apply where a case is transferred pursuant to § 1407 and where the Circuit Court of Appeals of the federal transferee court construes an applicable federal law differently from the Circuit Court of Appeals of the transferor court. The Second Circuit determined that the transferee court should ignore the law of the transferor court and follow the statute of limitations law of its own Circuit.[16]

Citing *Temporamandibular Joint*, *Menowitz*, and *In re Korean Air Lines*, the Sixth Circuit recently observed "that in a federal multidistrict litigation there is a preference for applying the law of the transferee district," but perhaps not where "that precedent [is] 'unique' to a particular circuit and arguably divergent from the predominant interpretation." *In re*

[16] Of the two cases of lower courts in the Fifth Circuit discovered by this Court that address the applicable law issue, one takes basically the same approach as the Second Circuit in *Menowitz*. Addressing a § 10(b) claim pending prior to the issuance of *Lampf*, a Louisiana district court concluded that the law of the transferee court should control the limitations issue. *In re Taxable Mun. Bond Securities Litig.*, 796 F. Supp. 954, 962-63 (E.D. La. 1992). The other, an unpublished opinion from the Western District of Texas, applied the *Eckstein* approach, following the law of the transferee forum except where federal law borrows state law. *Bakner v. Xerox*, No. SA-98-CA-0230-OG, 2000 WL 33348191 (W.D. Tex. Aug. 28, 2000).

Cardizem CD Antitrust Litigation, 332 F.3d 896, 912 (6th Cir. 2003), *petition for cert. filed*, 72 USLW 3393 (Nov. 24, 2003)(No. 03-779).

Here, in H-03-2345, this Court is addressing a diversity case with state law claims and a federal procedural statute for general removal that should be, but which this Court has concluded is not, uniformly construed, as reflected in the Sixth Circuit's allowance of post-removal cures of the petition for removal and written consents. The Seventh Circuit in *McMasters v. U.S.*, 260 F.3d 814, 819 (7th Cir. 2001), *cert. denied*, 535 U.S. 1112 (2002), stated, "Unlike the statute at issue in *Eckstein*, the Federal Rules of Civil Procedure are not intended to be geographically non-uniform," so the transferee court need not apply the precedent of the transferor court with respect to these rules. This Court concludes that if that theory of uniformity applies to federal procedural rules, certainly the same result would be true of federal procedure embodied in the relevant federal removal statutes, which are intended to be geographically uniform. Thus this Court concludes that under *In re Korean Air Lines* and its progeny, this Court has the right to independently investigate and decide the issue, with an eye toward Fifth Circuit precedent, which does not allow a post-removal cure of a procedural deficiency in the removal. Thus the Court concludes that the supplemental consent is untimely and a defect in removal procedure.

B. Certain Officer Defendants' Notice of Removal.

The issue is not so simply resolved, however. If the first removal by Outside Directors fails because of the procedural defect of failure to timely file written consents from all other served Defendants by the time they removed the case, does the second notice of removal, filed by the unserved Certain Officer Defendants, constitute a valid removal on diversity grounds?[17]

Section 1446(b) clearly requires that the first-served defendant must file a notice of removal within thirty days of being served for that defendant to remove a case from state to federal court. Where the courts differ in a multi-defendant diversity case is at what point the thirty-day time period for filing a notice of removal and/or consent is triggered as to each subsequently served defendant when the defendants are served at different times.

Moreover, this issue has been impacted by a 1999 Supreme Court case in which the United States Supreme Court addressed divided appellate court interpretations of § 1446(b) and held that the phrase "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading" means that the time for filing a notice of removal only begins to run when the defendant is formally served with a summons and has received a copy of the complaint. *Murphy Bros. Inc. v. Michetti Pipe*

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[17] No party has contended that the service of process, i.e., the service of the summons and copy of initial pleading filed by the plaintiff that was actually effected under Tennessee law, was improper. Thus there is no issue of state law requiring an *Eckstein* analysis here.

Stringing, Inc., 526 U.S. 344, 354 (1999). The high court emphasized that the statute should be read in light of a "bedrock principle":

> An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action and brought under a court's authority, by formal process. Accordingly, we hold that a named defendant's time to remove is triggered by simultaneous service of summons and complaint, or receipt of the complaint, "through service or otherwise," after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.

Id. at 347-48. Although there was only one defendant in *Murphy Brothers*, as discussed *infra*, courts have applied its rule to multi-defendant diversity cases and argued that because a person or entity only becomes a party over which the court has jurisdiction when he, she or it is properly served and notified of the suit by receipt of summons and the plaintiff's initial pleading, the clock for removal for each defendant only begins to tick with that formal service.

The majority of courts, following what is now called the "first served" rule, have held that all properly served and joined defendants must submit their consent to the removal petition in writing within thirty days of service on the **first-served** defendant. *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1261 7 n.9 (5th Cir. 1988); *Still v. DeBuono*, 927 F. Supp. 125, 129 (S.D.N.Y. 1996).[18]

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[18] The Fifth Circuit did allow that "[e]xceptional circumstances might permit removal when a later-joined defendant petitions more than precisely thirty days after the first

Nevertheless a growing number of courts, including three Circuit Courts of Appeals, have adopted the "later served" rule, which measures the thirty-day period from the date each defendant is served. *See McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 928 (4th Cir. 1992)[19](disagreeing with *Getty Oil* and holding that the thirty-day period to join in a removal petition begins to run anew for each individual defendant when that defendant is served); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532-33 (6th Cir. 1999),

defendant is served." *Brown v. Demco, Inc.*, 792 F.2d at 482; *Getty Oil*, 841 F.2d at 1362 n.12. Nevertheless, the only instance that this Court has found where the Fifth Circuit found such exceptional circumstances was in *Gillis v. Louisiana*, 294 F.2d 755 (5th Cir. 2002). In Gillis, the consent had to be authorized by a Defendant public board of directors, the Board of River Port Pilot Commissioners and Examiners, but the chairman of that board, who was a plaintiff in the suit, caused scheduling conflicts that prevented the board from meeting within the thirty-day period. *Id.* at 759.

[19] Part of the Fourth Circuit's rationale is that § 1446(b) refers to "receipt by **the defendant**, though service or otherwise, of a copy of the initial pleading . . . or within thirty days after the service of summons upon **the defendant** . . . .. The use of the singular 'seems to refer to the individual defendant, not defendants collectively.'" 955 F.2d at 926. It further decided that the requirement that the first served defendant filed a notice of removal within thirty days "does not imply in any way that later served defendants have less than thirty days in which to act." *Id.* at 926. Calling a single deadline for all defendants served as much as thirty days apart an "inequity," especially for the defendants, the Fourth Circuit turned to policy concerns. *Id.* at 927. The panel determined that Congress believed that "a defendant's right to remove a case that could be heard in federal court is at least as important as the plaintiff's right to a forum of his own choice," and that each individual defendant might need a full thirty days to investigate the propriety of a removal. *Id.* at 927, 928.

cert. denied, 528 U.S. 1076 (2000)[20]; *Marano Enters. of Kansas v. Z-Teca Rests., Incl*, 254 F.3d 753, 756-757 (8th Cir. 2001); *Varela v. Flintstock Construction, Inc.*, 148 F. Supp.2d 297 (S.D.N.Y. 2001). Although the Second Circuit has not ruled on the question, the Second Circuit district courts appear to be divided. Among those supporting the first-served role are *Payne v. Overhead Door Corp.*, 172 F. Supp.2d 475, 476-77 (S.D.N.Y. 2001); *Smith v. Kinkead*, No. 03 Civ. 10283 (RWS), 2004 WL 728542, *2 (S.D.N.Y. Apr. 5, 2004)(and cases cited therein); *Allstate Ins. Co. v. Zhigun*, No. 03 Civ. 10302 (SHS), 2004 WL 18747, *2 (S.D.N.Y. Jan. 30, 2004). Among those supporting the "last served" rule or "later served" rule (filing notice of removal/joinder within thirty days of service on each defendant, individually) are *Varela*, 148 F. Supp.2d at 300, 301 ("last-served" rule because it complies with *Murphy Brothers* and because "it preserves every defendant's opportunity to seek removal and provides every defendant with a uniform time in which to do so, where under the first served defendant rule, the procedural rights of later served defendants slip away before one is subject to any court's authority"); *Tate v. Mercedes-Benz USA, Inc.*, 151 F. Supp.2d 222, 224-25 (N.D.N.Y. 2001)(following *McKinney* because it prevents plaintiffs from employing "dilatory tactics to overcome the

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[20] In *Brierly*, the Sixth Circuit held that "a later served defendant has 30 days to remove the case to district court with the consent of the remaining defendants" and that the "first-served defendant can consent to removal by a later served defendant even if the first served defendant failed in its effort to remove. . . ." 184 F.3d at 533 & n.3

legitimate removal rights of defendants"); *Russell v. LJA Trucking Inc.*, No. 00-CV-7629, 2001 WL 527411, *1-2 (E.D.N.Y. May 11, 2001)(following later-served rule); *In re Tamoxifen Citrate Antitrust Litigation*, 222 F. Supp. 2d 326, 333-35 (E.D.N.Y. 2002)(following *McKinney*); *Piacente v. State University of New York at Buffalo*, No. 03-CV-0672E(SC), 2004 WL 816885, *1- (W.D.N.Y. Feb. 14, 2004).

The rationale of many of the courts adopting the later served defendant rule derives from their expansion of the rule in *Murphy Brothers*. For example, the *Marano* panel found neither the first-served nor last served rule "particularly compelling," but turned to the Supreme Court's opinion in *Murphy*, 526 U.S. 344 (holding that formal service was required to trigger the thirty-day period), as controlling the question; the panel decided that the Supreme Court "would allow each defendant thirty days after receiving service within which to file a notice of removal, regardless of when--or if--previously served defendants had filed such notices." *Marano*, 254 F.3d at 756-57. *See also Brown v. Tokio Marine & Fire Ins. Co.*, 284 F.3d 871, 873 (8th Cir. 2002) *cert. denied*, 537 U.S. 826 (2002). With respect to *Murphy Brothers*, the Eighth Circuit commented, "We are convinced, however that the legal landscape in this area has been clarified, and perhaps the definitive answer portended by the Supreme Court's decision . . . ." *Marano*, 254 F.3d at 756. It determined,

> The Court essentially acknowledged the significance of formal service to the judicial process, most notably the importance of service in the context of the time limits

> on removal (notwithstanding an earlier admonition by the Court in *Shamrock Oil & Gas Corp. v. Sheets* . . . for strict construction of the removal statute). We conclude that, if faced with issue before us today, the Court would allow each defendant thirty days after receiving service within which to file a notice of removal, regardless of when--or if--previously served defendants had filed such notices.

Id. at 756-57, *citing and quoting* 16 James William Moore, *et al.*, *Moore's Federal Practice* § 107.30[3][a][i] at 107-163 (3d ed. 2000)(Under *Murphy Bros.* holding, "[I]t is likely that the later served defendants may not have their removal right compromised before they are served, and that they ought to have the opportunity to persuade the earlier served defendants to join the notice of removal. Thus the fairness approach may well, and should, supercede [*sic*] the unanimity rule.").[21] *See also, e.g.*, *Piacente*, 2004 WL 816885, *3 and n.25 (Like the Eighth Circuit in *Marano*, the *Piacente* court concluded that, logically extended, *Murphy Bros.* favors adoption of the date of service on the removing defendant, as opposed to the date of service on the first served defendant. . . . "[i]nasmuch as *Murphy Bros.* has thus altered the analysis with respect to the time for removal in multidefendant cases, pre-*Murphy Bros.* cases are no longer sound

[21] The Court notes that in a later edition of his treatise, Moore states that *Murphy Brothers* "should have an effect on the development of the law on this issue . . . [and that] it is likely that the [Supreme] Court may decide that the later served defendants may not have their removal right compromised before the are served . . . ." 16 James William Moore *et al.*, *Moore's Federal Practice* § 107.30[3][a][i] at 107-163 (3d ed. 2003). *Piacente*, 2004 WL 816885 at *3 n.22.

authority.")(and citing numerous decisions in agreement)[22];

[22] In *Piacente*, 2004 WL 816885, at *2-3 [footnotes and citations omitted], the district court provides a comprehensive summary of "statutory reasons" given by various courts for adopting the later served defendant rule, or what the *Piacente* court terms the "RD" (removing defendant") rule:

> First, in order to support the FSD [first served defendant] rule, section 1446(b) would have to be interpreted so as to insert the word "first" before defendant. This construction (i.e., "the [first] defendant") is not supported by the text of section 1446(b). In order to support the RD rule, on the other hand, one must only read section 1446(b) in context, such that "the defendant" is interpreted as "the defendant [who has filed a notice of removal]"--*i.e.*, the RD. This construction is supported by the text of section 1446(b)--*i.e.*, "The notice of removal * * * shall be filed within thirty days after receipt by *the* defendant [emphasis added]--and requires no additional words to be inserted. . . .
>
> Second, courts that find section 1446(b) to be ambiguous do so based on the premise that it "contemplates only one defendant and thus does not answer the question of how to calculate the timing for removal in the event that multiple defendants are served at different times, one or more of them outside the original 30 day period." This premise, however, is wrong. Section 1446(b)'s singular use of "the defendant" contemplates only one defendant because it is referring to the RD, the defendant who filed a notice of removal--other served defendants may join in or consent to RD's notice of removal. This interpretation is supported by section 1446(a), which provides in relevant part:
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>> "A defendant or *defendants* desiring to remove any civil action * * * from a State court shall file in the district court * * * *a notice of removal* * * * containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and

Shadie v. Aventis Pasteur, Inc., 254 F. Supp. 2d 509, 515 (M.D. Pa. 2003)(*Marano* rule "appears to be a necessary corollary to the Supreme Court's recent decision in *Murphy Brothers*"); *Ratliff v. Workman*, 274 F. Supp. 2d 783, 788-91 (S.D. W. Va. 2003); *Zollner v. Swan*, No. Civ. A 03-1110, 2003 WL 22097457, *2-3 (E.D. Pa. May

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> orders served upon such defendant or *defendants* in such action." (Emphasis added). . . .
>
> In other words, section 1446(a) demonstrates that Congress specifically contemplated cases involving multiple defendants. . . . Congress, therefore, must have contemplated that the time for filing of a notice of removal would be calculated based on the date of service or process on the defendant who filed the notice or removal . . . .
>
> Third, the RD rule respects the "rule of unanimity" because there is a difference between a right to remove and a right to consent to removal . . . . Accordingly, a FSD defendant who fails to timely remove an action may nonetheless consent to timely removal by a later-served defendant-the RD.
>
> Fourth, the Supreme Court's decision in *Murphy Bros*. . . . suggests that the RD rule 'is the proper interpretation of section 1446(b). . . . [I]f a person or entity becomes a party only upon service of process, it logically follows that a person or entity may only be required to "take action" by filing a notice of removal once he/she has become a party to the litigation via formal service of process. . . .
>
> Fifth, Congress could have drafted section 1446(b) in a manner that would have expressly calculated the time for removal based on the service of the FSD. The fact that it did not draft such a provision suggests that Congress did not intend to codify a FSD rule. Read in context, subsections 1446(a) and (b) . . . demonstrate[] congressional intent to codify a RD rule.

13, 2003)(later served rule "prevents plaintiffs from manipulating service in order to block removal," "promotes resolution at an early stage of the litigation by removing any incentive for plaintiff not to identify all defendants at the initial stages," and insures that a "later served defendant [ill] not suffer for plaintiff's mistakes or omissions"); *Collings v. E-Z Serve Convenience Stores, Inc.*, 936 F. Supp. 892 (N.D. Fla. 1996). As Howard Stravitz explains in arguing for the later served defendant rule, "[T]he underlying policy rationale" of *Murphy Brothers* is "that a defendant's substantive and procedural rights may not be abridged absent the notice provided by a summons and the information provided by a complaint." 53 S.C. L.Rev. at 195.

Needless to say, the conflict continues. Neither the Supreme Court nor the Fifth Circuit has addressed the question of the unanimity rule's applicability to removal since the issuance of *Murphy Brothers*. One district court in the Fifth Circuit, citing *Murphy Brothers*, has limited the Supreme Court's holding to the first served defendant and has not adopted the view of the Fourth, Sixth, and Eighth Circuits that each subsequently served defendant has a right to remove, with the consent of the other served defendants, even if the first defendant failed to effect a proper removal. *See Microtune, Inc. v. Big Shine Worldwide, Inc.*, No. Civ. A. 3:03-CV-726-K, 2004 WL 414901 (N.D. Tex. Feb. 11, 2004)(citing *Murphy Brothers* for the rule that "the 30-day clock does not begin running until the defendant is formally served through certified mail," determining that the clock began to run when service or process under the Texas long-arm statute was forwarded by the Secretary of State to, and received by, the defendant's employees, and reaffirming that "[t]he rule in this Circuit in cases involving multiple defendants is that the 30 day period for removal begins to run immediately after the first defendant is served . . . . If the first served defendant does not effect a timely removal, subsequently served defendants cannot remove the case to federal court."). Another has also followed the Fifth Circuit's first-served rule, found no "exceptional circumstances" under *Demco*, 792 F.2d at 482, to justify permitting a subsequently served defendant to remove the case, and noted,

> Defendants contend that in *Murphy Bros.'s* [*sic*], the Supreme Court acknowledged the inherent unfairness of attempting to impose a duty to notice removal on a party which has not been served. Defendants do not cite a Fifth Circuit case, and this court has been unable to locate any, which has addressed the issue of *Murphy Bros.'s* effect on cases like *Getty Oil*. Further, *Murphy Bros.* did not address or even mention the first served defendant rule. Thus this court declines to extend its reasoning to overrule the well established Fifth Circuit precedent of *Getty Oil*.

Baych v. Douglass, Inc., 227 F. Supp. 2d 620, 621-22 (E.D. Tex. 2002).

Because this Court follows Fifth Circuit law and because there is no indication that the Fifth Circuit has veered from its first-served defendant rule in the wake of *Murphy Brothers* despite the strengthening trend in favor of the later-served defendant rule, the Court finds that Certain Officer Defendants' [second] notice of removal is untimely and of no effect.

Thus because many Defendants failed to join or file written consents by the time of the first removal and because the second notice of removal is null under the controlling first-served defendant rule, this Court lacks diversity jurisdiction over H-03-2345 because of the procedural defect in removal.

II. Unanimity and "Related To" Bankruptcy Removal Under § 1452

Regarding those member cases over which this Court has "related to" bankruptcy jurisdiction under § 1452, the Court has distinguished and continues to differentiate the usual situation supporting the *Eckstein* rule of applicable law after a § 1407 MDL transfer from the unusual situation here, where the MDL transferee court is in the Fifth Circuit and the Enron bankruptcy court is in the Second Circuit. This Court has concluded that Second Circuit law must apply to these cases because the "related to" bankruptcy jurisdiction exercised by this Court, concurrently with that exercised by Judge Gonzales in the Enron bankruptcy proceedings,[23] is derived from the Second Circuit and Judge Gonzales' bankruptcy court in the Southern District of New York and because of the consequent need for uniformity between Judge Gonzales' and this Court's rulings. See instrument #995 at 19-22 in *Newby*.

In addition to removal on diversity jurisdiction grounds under 28 U.S.C. § 1332(a)(1) and § 1441, Defendants here have asserted an alternative basis for their removal, "related to" bankruptcy jurisdiction, and have raised the issue of whether, in

[23] *In re Enron Corp. et al.*, No. 01-16034.

multiple-defendant cases, timely unanimity of consent is required for removals under § 1334(b) and § 1452.

This Court has struggled with this issue, about which the case law is not only divided, but proffers very limited analysis. In its order of September 15, 2003 (#26 at 8-20 in *American National et al. v. Arthur Andersen, et al.*, G-02-585; #1661 at 8-20 in *Newby*) this Court determined that unanimity among Defendants, timely expressed, was required for "related to" bankruptcy jurisdiction removals. Nevertheless, after reading the briefs submitted by the parties, both before and after its previous order, performing additional research, and considering the question again, for the reasons explained below, this Court has changed its mind and now concurs with the majority of courts that have ruled on this question, though there are not many, that unanimous consent among defendants is not required for removal under 28 U.S.C. §§ 1334(b) and 1452.[24]

[24] Contrary to one party's contention that this Court is bound by its earlier decision under the law of the case doctrine, that doctrine applies only on remand after an appellate court makes a decision in the course of litigation. *See, e.g., United States v. Slanina*, 359 F.3d 356, 358 (5th Cir. 2004)("'Under the law of the case doctrine, as issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal. [citation omitted]'"); *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004)(The law of the case doctrine's "proscription covers issues we have decided expressly and by necessary implication . . . reflect the 'sound policy that when an issue is once litigated and decided that should be the end of the matter. [citation omitted]'"). Even then the doctrine's bar is not absolute, but "is an exercise of judicial discretion which 'merely expresses the practice of courts generally to refuse to reopen what has been decided,' not a limit on judicial power. [citation omitted]'"). *Lee*, 358 F.3d at 320. The Fifth Circuit has allowed the "district court on remand to deviate from a ruling made by a court of appeal

Initially this Court concluded that the unanimity rule and the first-served defendant rule applied to "related to" bankruptcy jurisdiction actions under § 1452 based on ruling in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). In that case, the Supreme Court addressed the fact that remand under § 1447 and remand under § 1452 are based on different grounds. The general remand provision, § 1447(c), provides, "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under § 1446(a)." The same statute mandates that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[25] Thus a suit may be remanded under § 1447 for lack of subject matter jurisdiction or for a defect in removal procedure. In contrast, § 1452(b), also with exceptions not relevant here, provides that "the court to which [a 'related

in an earlier stage of the same case in certain exceptional circumstances." *Id.* It has identified three exceptions to the doctrine: "'(1) The evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice. [citation omitted]'" *Id.* at 320 n.3.

Here there has been no final judgment nor an interlocutory appeal certified. Indeed, were this court unable to change its ruling in the course of litigation, motions to reconsider, such as the one before it here, would not be permitted.

[25] Furthermore, under § 1447(d), "[a]n order remanding a case to the State Court from which it was removed," based on either a procedural defect or a lack of subject matter jurisdiction, "is not reviewable on appeal or otherwise," with an exception not relevant here.

to' bankruptcy] claim or cause of action is removed may remand such claim or cause of action on **any equitable ground** [emphasis added]."[26]

The basis for the requested remand here, purportedly untimely submission of written consent by served Defendants, is not an "equitable ground," but a procedural defect. *See, e.g. Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1044 (11th Cir. 2001)("remand based solely on the unanimity requirement is clearly based on a defect in the removal process").

In *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), Justice Thomas, writing for a unanimous Supreme Court, examined a case which had been removed under both § 1452 and § 1441(a), but which was ordered to be remanded by the district court for a "procedural defect," i.e., that the removal petition was untimely under both removal statutes and thus the bankruptcy court lacked jurisdiction. 516 U.S. at 126. On appeal, the Sixth Circuit held that it had no jurisdiction and that appellate review was barred by both § 1447(d) and § 1452(b). The Supreme Court affirmed the Sixth Circuit, concluding that remands based on the grounds recognized in § 1447(c), i.e., a timely raised procedural defect or lack of subject matter jurisdiction, are barred from appellate review under § 1447(d). *Id.* at 126-27.

[26] Furthermore the statute also provides that "an order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals . . . ." *Id.*

Because the remand was not based on an "equitable ground" under § 1452(a), which bars appellate review of such orders, the plaintiff, Petrarca, argued that § 1452 did not govern the remand and did not bar review. 516 U.S. at 127. Justice Thomas concluded, "We reach the same conclusion regardless of whether removal was effected pursuant to § 1441(a) or § 1452(a)" because § "1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well.'" *Id.* at 129, 128, *quoting United States v. Rice*, 327 U.S. 742, 752 (1946)(emphasis added). He further opined,

> There is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy. Nor is there any reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage. The fact that § 1452 contains its own provision governing certain types of remands in bankruptcy . . . does not change our conclusion. There is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. We must, therefore, give effect to both.

Id. at 129.[27] Thus § 1447(d) applies to all remand orders, no matter under which statute the action is removed. One could infer from *Things Remembered* that all the removal procedures set out in §§ 1441-1451 (constituting the federal removal statute) apply to

[27] In her concurrence, Justice Ginsberg wrote, "Section 1452(b) is most sensibly read largely to supplement, and generally not to displace, the rules governing cases removed from state courts set out in 28 U.S.C. § 1447." 516 U.S. at 131. She further concluded that § 1452(b) independently warrants the judgment that remand orders in bankruptcy cases are not reviewable." *Id.*

cases removed under § 1452 as long as they are not inconsistent, i.e., as long as they "comfortably coexist," with § 1452.[28]

The unanimity rule and the first-served defendant rule are other removal procedures, derived from § 1441[29] and § 1446, respectively. Therefore the Court examines the general removal statute, § 1441, and the specific statute for removal of bankruptcy claims, § 1452, to determine whether they "comfortably coexist" for purposes of the unanimity rule.

"The words of the statute 'are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . .'" *Matter of Nobleman*, 968 F.2d 483, 488 (5th Cir. 1993)(*quoting Watt v. Alaska*, 451 U.S. 259, 266 n. 9 (1981)), *aff'd sub nom. Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). "'[E]very word in a statute is presumed to have been used for a purpose; and a cardinal rule of statuory

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[28] *Things Remembered* addressed only the provisions limiting appellate review of remand orders under § 1447 and § 1452, but clearly its holding has much wider implications.

In *Coward v. AC and S, Inc.*, No. 02-51175, 2004 WL 75425, *2 (5th Cir. Jan. 14, 2004, relying on *Things Remembered*, the Fifth Circuit abrogated *In re Hofmann*, 248 B.R. 90, 93-94 (Bankr. W.D. Tex. 2000)(holding that a request for attorney's fees and costs under § 1447(c) does not apply to cases removed under § 1452.). Citing *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 324 (10th Cir. 1994), *cert. denied*, 511 U.S. 1082 (1994), the Fifth Circuit noted that *Daleske* "predated *Things Remembered* [and] clearly articulated how §§ 1447 and 1452 can comfortably coexist when it held that an award of attorney fees and costs can be made for a case that was removed pursuant to § 1452." 2004 WL 75425, *3.

[29] *Doe v. Kerwood*, 969 F.2d 165, 167 (5th Cir. 1992)(§ 1446(a)'s procedural rule, which the Fifth Circuit has construed as requiring that all defendants join in the removal petition, is based on § 1441(a)).

construction is that each sentence, clause and word is to be given effect if reasonable and possible [citation omitted].'" *Martin K. Eby Const. Co., Inc. v. Dallas Area Rapid Transit*. ___ F.3d ___, No. 03-10728, 2003 WL 911796, *4 (5th Cir. Apr. 29, 2004). Where there is conflict or inconsistency between the provisions, the rules of statutory construction mandate that the specific language of one section controls over the general language of the other. *Id.* at 488. Furthermore,

> Even if two statutes conflict to some degree, they must be read to give effect to each, if that can be done without damage to their sense and purpose, unless there is evidence either in the text of the statute or its legislative history that the legislature intended to repeal the earlier statute and simply failed to do so expressly. Legislative intent to repeal must be manifest in the "'positive repugnancy between the provisions.'"

United States v. Cavada, 821 F.2d 1046 (5th Cir. 1987), *cert. denied*, 484 U.S. 932 (1987). Here § 1452 is both more specific, in that it relates only to bankruptcy-related claims, and it was enacted after §§ 1441-1451.

As is proper in construing statutory provisions, the Court begins with the text of the relevant provisions and must examine the language, the context, and the statute as a whole to determine whether it is plain or ambiguous. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). An review of the statutory scheme relating to removal provides insight into § 1452's distinctive function in that scheme and supports the view that joinder or consent of other defendants is not necessary for removal under that statute. In contrast to what the Supreme Court highlighted as § 1452's silence regarding remands made on non-equitable grounds that made it possible to give effect simultaneously to both § 1147 and § 1452, with respect to the consent issue there is an express inconsistency between the texts of the general removal statute, § 1441(a), in conjunction with § 1446(a), and of the specialized bankruptcy removal statute, § 1452, a difference with substantial legal consequences.

Section 1441(a), the general removal statute, provides for removal "by the defendant or the defendants." Section 1446(a), addressing the procedure for such removal, refers to "[a] defendant or defendants desiring to remove . . . ." It is well established that in multiple-defendant cases, under the "unanimity rule," grounded in § 1441(a)'s reference to removal by "the defendant or defendants," that for general removal all properly served and joined defendants must consent to the petition for removal of a case to federal court. *Chicago R.I. & P.R. Co. v. Martin*, 178 U.S. 245, 248 (1900); *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1261 & n.9 (5th Cir. 1988); *Bradford v. Harding*, 284 F.2d 307, 309 (2d Cir. 1960); *Russell Corp. v. American Assurance Co.*, 264 F.3d 1040, 1044 (11th Cir. 2001).

In contrast, the more specific "related to" bankruptcy removal statute, § 1452(a), provides that "**A party** may remove [emphasis added]" a claim or cause of action over which the district court has jurisdiction pursuant to § 1334(b)("civil proceedings arising under title 11, or arising in or related to cases under title 11"). The verbal distinction between §

1441(a)'s "a defendant or defendants" and § 1452's "a party" is legally significant; "a party" indicates that any party, whether a plaintiff or a defendant may, singly, remove claims related to bankruptcy proceedings. Moreover, "a party" is also "arguably broad enough to encompass actions removed under § 1452 by debtor and non-debtor third-party defendants and by either type of third-party plaintiffs, who are generally defendants in the primary action that resulted in the assertion of third-party claims" where the claims affect the bankruptcy estate. Thomas B. Bennett, *Removal, Remand and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 Cumb. L. Rev. 1037, 1052-53 (1996-97),[30] *citing First Fiscal Fund Corp. v. Fishers Big Wheel, Inc.*, 36 B.R. 299, 301 (Bankr. E.D.N.Y. 1984); *In re Success Data Systems, Inc.*, 58 B.R. 81 (Bankr. E.D. Pa. 1986); and *In re Mansen*, 20 B.R. 391 (Bankr. D. Mass. 1982).[31] This Court notes that § 1441(a) opens with the phrase, "Except as otherwise expressly provided by Act of Congress, . . ."; § 1452 is an instance of that "otherwise expressly provided by Act of Congress." Relying on *Creasy v. Coleman Furniture Corp.*, 763 F.2d

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[30] As a point of contrast, Bennett points out that it is "universally accepted" that removal by defendant(s) under § 1441(a) is limited to original defendants that were joined by the plaintiff. *Id.* at 1053.

[31] Bank Defendants have emphasized that under the Court's earlier ruling that unanimity was required for removal under § 1542, "a bankruptcy debtor itself would not be able to remove an action to federal court if it could not gain the consent of its co-defendants. Certainly, such a result was not the intention of the drafters of the removal statutes and, in fact, would directly contravene Congress' desire to have all matters relating to a bankruptcy decided in one federal forum." #1734 at 3.

656, 660-61 (4th Cir. 1985),[32] some lower courts in the Second Circuit have held that to effectuate the goals of the Bankruptcy Code, "[t]he plain language of Section 1452 indicates that a single party may remove the action without obtaining consent from any other party." *Mt. McKinley Ins. Co. v. Corning, Inc.*, No. 02 CIV. 5835 (DLC), 2003 WL 1482786, *6 (S.D.N.Y. Mar. 21, 2003); *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 330 (S.D.N.Y. 2003). Judge Denise Cotes, in the *WorldCom* Litigation, has expressly held that § 1452 does not require that all defendants consent to removal. *In re WorldCom, Inc. Sec. Litig.*, Nos. 02 CIV. 3288, 03 CIV. 6220, 03 CIV. 6224, 03 CIV. 6221 and 03 CIV. 6223, 2003 WL 22383090 (S.D.N.Y. Oct. 20, 2003). Noting that two circuit courts that have examined the question have both reached the same conclusion, Judge Cote also examined the statute's use of "a party" as the significant factor. *Id.*, 2003 WL 22383090 at *2, citing In re Lazar, *237 F.3d at 973 n.2 and* Creasy, *763 F.2d at*

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[32] A number of courts have observed that the Fourth Circuit in *Creasy* cited no authority for its holding and did not examine the language of that provision. The Sixth Circuit did indicate that the unanimity requirement does not apply to bankruptcy removals because "[o]therwise, the policy of having all related bankruptcy matters litigated in one forum would be unnecessarily restricted." 763 F.2d at 660-61. A few courts have relied upon *Creasy*, but continued to provide no explanation for the holding. *See, e.g., Plowman v. Bedford Fin. Corp.*, 218 B.R. 607, 616 (N.D. Ala. 1998); *Roper v. Am. Health & Fire Ins. Co. Commercial Credit Corp.*, 203 BR 326, 330 n.3 (Bankr. N.D. Ala. 1996); *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied sub nom. Maitland v. Mitchell*, 515 U.S. 1131 (1995). Some of its progeny, however, have focused on the language of § 1452 to demonstrate its express inconsistency with § 1441, as well as the broad jurisdictional grant under the Bankruptcy Code, to distinguish the unanimity issue under § 1452 from the appellate review question at issue in *Things Remembered*.

660-61. See also In re Adelphia Communications Corp. Sec. and Derivative Litig., No. 03 MDL 1529, 2003 WL 23018802, *3 (S.D.N.Y. Dec. 23, 2003); *Connecticut Res. Recover Authority v. Lay*, 292 B.R. 464, 471 (D. Conn. 2003).

Several lower courts within the Fifth Circuit have determined that § 1452 does not require consent of all served defendants. *See generally Sommers v. Abshire*, 186 B.R. 407, 409 (E.D. Tex. 1995)("The plain language of section 1452 differs from the language of . . . section 1441(a) . . . ."; holding that "section 1452 of the bankruptcy removal statute permits an individual defendant in a multidefendant case to remove an action from state court without the joinder or consent of the other defendants when the lawsuit contains matters related to a bankruptcy case"); *Beasley v. Personal Finance Corp.*, 279 B.R. 523, 529 (S.D. Miss. 2002); *Joe Conte Toyota, Inc. v. Howell*, No. CIV. A. 97-0686, 1997 WL 22210, *1 (E.D. La. Apr. 30, 1997)("Regarding consent, removals of claims related to bankruptcy cases are governed by 28 U.S.C. § 1452, under which any one defendant has the right to remove without the consent of other defendants."); *In re Eagle Bend Development*, 61 B.R. 451 (Bankr. W.D. La. 1986).

The decision in *Creasy* also conclusorily referenced another factor supporting the view that a single party may remove the action without having to obtain consent from any other party under § 1452 is that although general removal statutes are strictly construed because of federalism concerns,[33] the bankruptcy removal statutes are to be broadly construed in favor of removal. *Things Remembered, Inc. v. Petrarca*, 516 U.S. at 131-32 ("Congress, when it added § 1452 to the Judicial Code chapter on removal of cases from state courts . . . meant to enlarge, not to rein in, federal trial court removal/remand authority for claims related to bankruptcy cases.")(Ginsburg, J., concurring); *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 705 (2d Cir. 1995)(Both the Supreme Court and the Second Circuit have "broadly construed the jurisdictional grant of the 1984 Bankruptcy Amendments."); *Mt. McKinley Ins. Co. v. Corning, Inc.*, No. 02 Civ. 5835 (DLC), 2003 WL 1482786, *6 (S.D.N.Y. Mar. 21, 2003)("In order to achieve the aims of the Bankruptcy Code, the plain language of § 1452 allows a single defendant in a multi-defendant case to remove a claim or cause of action for which there is federal subject matter jurisdiction pursuant to Section 1334."). The expansive grant of jurisdiction is highlighted in *In re WorldCom, Inc. Sec. Litig.*, 293 B.R. at 328: "Instead of providing for removal of any action over which the federal courts have *original* jurisdiction, as Section 1441 does, Section 1452 provides for removal of any action subject to the *bankruptcy* jurisdiction of the federal courts, as that jurisdiction is defined in Section 1334." Such a broad grant serves what the Fourth Circuit in

[33] *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); and *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

Creasy described as "the policy of having all related bankruptcy matters litigated in one forum."

Accordingly, for the reasons indicated above, the Court

ORDERS that Plaintiffs' motion to reconsider (instrument #1609 in *Newby;* #40 in H-03-2345) is GRANTED, but that their motion to remand is still DENIED because this Court has "related to" bankruptcy jurisdiction under § 1452, which does not require unanimous consent of defendants. Because there is no remand, Plaintiffs' request for costs, expenses and attorney's fees under 28 U.S.C. § 1447(c) is MOOT. Finally, the Court

ORDERS that Plaintiffs' motion to ascertain status of remand motions (#2056 in *Newby)* is also MOOT.

SIGNED at Houston, Texas, this 19th day of May, 2004.

Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE